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DOCTORS, SAMARITANS AND THE ACCIDENT VICTIM †

BY R. J. GRAY* AND G. S. SHARPE**

Although the Hippocratic Oath does not specifically impose a duty on a physician to volunteer aid at a roadside accident,¹ certainly most individuals would agree that a moral duty to do so exists. Yet it is often asserted that many North American doctors would refuse to stop to render assistance at an accident scene, and that certainly most would do so only with extreme reluctance. Is this indeed the case, and, if so, why?

Frankly, having recently participated in a survey of Canadian doctors (all members of the Ontario Medical Association) which found that over 90 per cent would stop to help if they saw somebody lying injured along the road,² one might be inclined to feel that the dimensions of the problem have been exaggerated. On the other hand, two polls of U.S. physicians in the past ten years have found that 50 per cent of those who answered said they would not stop in such a situation,³ citing as the principal reason a fear of possible malpractice actions.⁴

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¹As quoted in Foxe, *The Oath of Hippocrates* (1945), 19 *Psychiatric Q.* 17.

²See text *infra*, under heading, Surveys, note 111.

³See, *Newsweek*, September 4, 1961, at 41, which reports the result of a survey of 1200 doctors by the Medical Tribune, August 28, 1961, at 23. See also, Chayet, *The Legal Implications of Emergency Care* (New York: A.C.C., 1969) at 24, 36, which refers to an A.M.A. Survey of 7500 doctors in 1963. See, (1964), 189 *J.A.M.A.* 863.

⁴This was also the main reason for not stopping suggested by those Canadian doctors who said they would not stop. See text, *infra*, under heading, Surveys, note 111.

Why this marked difference in attitude towards stopping at roadside accidents should exist between doctors in two jurisdictions with what a casual observer would take to be remarkably comparable social structures (certainly the two groups of physicians share almost identical systems of medical training and qualification), cannot be explored in this paper. One might hypothesize that such factors as the different litigation systems in the two countries—the Canadian system sharply discourages speculative law suits while the U.S. system appears to an outsider to encourage them;⁵ damage awards given by Canadian courts being relatively miserly compared to those given by U.S. courts; and the rather tranquil and restrained view of the problem of malpractice suits arising from emergency aid taken by the Canadian media, medical or otherwise, compared to their American counterparts,⁶ are relevant. Other possibilities are legion.

In any event, when one considers that there are some five million personal injury automobile accidents in North America every year,⁷ if even one in ten, and most certainly if half, of those most qualified to render meaningful assistance in such situations would refrain from doing so, then a genuine social problem of considerable magnitude does exist. This view is reinforced if one makes what appears to be the valid assumption that those physicians who answered negatively in the automobile accident situation had no special predilection against road accident victims as such, and would behave the same way in any emergency aid situation whether the immediate source of the situation was a misdirected automobile, a misplaced banana peel or an Act of God. The number of such emergency aid situations is astronomical.⁸ If this assumption is made, then while it is true that in only a fraction of these situations does this modern version of the Doctor's Dilemma actually arise—by that we mean that in only a certain percentage, undoubtedly a small percentage, of these situations, is a doctor actually put to the decision to be a Good Samaritan or not—still, and although for obvious reasons no realistic statistical information can be available, quantitatively a substantial amount of suffering, even a number of deaths, occur each year which would not occur if all or more physicians were prepared to render aid in these situations.

What tactics can the law adopt to alleviate this situation? More than

⁵The lawyer's contingent fee is not merely unprofessional but a crime in most Canadian provinces. Moreover, in Canada, unlike the U.S., the losing side in a law suit almost always must pay the winning side's costs, *which include the lawyer's fees*. Obviously this discourages speculative and vexatious actions. Only actions with a substantial prospect of success find their way to court. Of course, equally obviously, the Canadian system may (on occasion) deter a meritorious claim being pursued because the plaintiff cannot afford the risk of starting and losing.

⁶See, the comments of Governor Kerner of Illinois, note 123, *infra*. See also, Chayet, *supra*, note 3 at 25 and 27.

⁷Department of Transportation, Report to Congress and the President, "Motor Vehicle Crash Losses and Their Compensation in the United States" 2(1971). Indeed, the October 14, 1972 edition of *Business Week* (at 40) indicated that "most transportation fatalities take place on the highways and, . . . There were 53,640 motor-vehicle-related fatalities . . . in 1971. This was down a miniscule percentage from 53,840 deaths in 1970".

⁸One recent estimate for the United States is 52 million. See, 7 *Status Report, Insurance Institute for Highway Safety*, No. 17, September 18, 1972, at 7.

two-thirds of the United States⁹ and one Canadian Province¹⁰ have some form of, what is called, the Good Samaritan statute. This is a type of legislation which might fairly be called "negative"—in the sense that individuals are not required to act but, once they do, they are relieved of liability for carelessness in the course of their acts. The underlying rationale¹¹ of such legislation is to the effect that physicians—and others—will not only be more likely to stop but will be more prepared to undertake the type of "rough and ready" procedures that the urgent nature of the emergency situation may call for, if they know in advance that their efforts will not be subject to litigious post mortems. On the other hand, European countries have chosen the stick rather than the carrot. Instead of the Good Samaritan route, they have preferred legislation of a "positive" nature whereby individuals are required to render assistance in emergencies under penalty of fine or imprisonment.

The fact that in both America and Europe specific legislation has been found necessary to encourage people to help others in distress indicates rather clearly what the general historical legal position is on both continents. The Samaritan has been acclaimed as a moral model; the Priest and the Levite have been our legal models.

Common Law Situation

The common law of England—on which the core legal systems of the United States and Canada are based—imposes no liability on physicians, or others, for failing to come to the aid of an accident victim. The only common law exceptions to the general rule of no liability for omissions fall in those instances where a special relationship creates a duty to act, such as the failure of a parent to provide for his child, or of a husband to provide for his wife when she is helpless.

What we are really talking about here is the imposition of tort liability for what lawyers call "nonfeasance"—a somewhat mystifying term which means simply "failure to act". The common law has tended to impose a duty to act only where the potential actor has created a relationship with another from which he expects to obtain a benefit. Bohlen, writing in 1908,¹² expressed the legal situation as follows:

There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and nonfeasance, between active misconduct working positive injury to others and passive inaction, a failure to take positive steps to benefit, or to protect them from harm not created by any wrongful act of the defendant.

However, the common law position while imposing no duty to act affirmatively at all goes on to hold that if one begins to act and botches the

⁹According to Chayet, *supra*, note 3, only the following states do not have "Good Samaritan" legislation: Alabama, Colorado, Hawaii, Idaho, Iowa, Kentucky, Minnesota, Missouri, North Carolina, North Dakota (although it does have a statute establishing the scope of a physician's duty in an emergency situation), Oregon, Vermont, Washington.

¹⁰Alberta, Emergency Medical Aid Act, S. Alta. 1969, s. 3.

¹¹Howell, *Good Samaritan Not Liable for Negligent Emergency Care Unless Wilfully or Wantonly Negligent* (1961-62), 40 Texas Law Rev. 909.

¹²Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability* (1908), 56 Univ. of Penna. L.R. 217.

job, i.e., if one stops to give aid and these well-intentioned efforts worsen the injured person's position, then this is misfeasance and civil liability on the actor can be imposed for the additional injuries, if his actions are subsequently characterized by a court as negligent. Our law thus, in theory at least, has, as one legal commentator puts it, "created the anomaly of subjecting the incompetent Samaritan to liability while excusing the Levite".¹³

If the authors' empiric research based on countless cocktail party conversations with medical friends can be taken as valid, this is the one morsel of hard law that *all* doctors seem to know. If one demands somewhat more scientific research, the Canadian survey mentioned earlier decisively supports this observation.¹⁴ This is a pity indeed, since while it is, more or less, a legal "truth", it is far from being "the whole truth". It fails to point out that, while it is true that if you spend your life in bed you substantially diminish the chances of ever being sued, the law, as it must (since otherwise society would never change or progress), cherishes positive action and only imposes liability on actors when they have carried on their activities in a manner well beyond the community pale.¹⁵ Moreover, it does not take into account that the law admires the rescuer¹⁶ and that successful actions against Good Samaritans occur with about the same frequency as hen's teeth.¹⁷

Most legal commentators¹⁸ feel that the common law emergency doctrines adequately safeguard the Good Samaritan actor. Individuals at the accident scene are only required to exhibit the requisite degree of skill of a reasonable man in like circumstances.¹⁹ As the particular circumstances are a crucial factor, a physician in an emergency situation is not held to the same level of judgment and performance as he would be under normal conditions. In practice, not only do the courts refrain from imposing unduly strict standards

¹³Fleming, *The Law of Torts* (4th ed.), at 142. In the words of Cardozo C.J. "The hand once set to a task may not always be withdrawn with impunity though liability would fail if it had never been applied at all". *Moch Co. Inc. v. Rensselaer Water Co.* (1928), 247 N.Y. 160 (N.Y.C.A.)

¹⁴See text, *infra*, under heading, Surveys, Canadian survey, question 3.

¹⁵The development of the tort of negligence, at least until very recent times, is really an effort by the Courts to encourage fruitful activity by reducing the inhibitions on activity created by the rule of absolute liability of the ancient common law. Instead of paying simply because you caused injury, negligence law says you pay only for those injuries you cause through activities carried on in an "anti-social" or "faulty" way. See, Lord Denning, M.R., in *Letang v. Cooper*, [1965] 1 Q.B. 232 (C.A.) and Fleming, *The Law of Torts* (4th ed. 1971) at 7, 23.

¹⁶So, for example, when he is injured during his attempt to aid, the courts have strained to permit him to recover for his injuries: *Wagner v. International Railway Co.* (1921), 232 N.Y. 176 (C.A.); *Chapman v. Hearse* (1961), 106 Commonw. L.R. 112 (H. Ct. Australia); *Baker v. T.E. Hopkins Ltd.*, [1958] 3 All E.R. 147 (Eng. Q.B.D.), affirmed on appeal [1959] 3 All E.R. 225.

¹⁷See, Chayet, *supra*, note 3 at 24. Also, Note (1963), 51 Calif. L. Rev. 816 at 817.

¹⁸For example, Yeutter, 41 Nebraska Law Rev. 609 at 614, states that "it would thus appear that physicians or nurses rendering emergency medical treatment would normally have adequate common-law protection against unwarranted liability".

¹⁹See, Prosser, *Law of Torts* (3d. ed. 1964) at 171; *Watts v. Herts C.C.*, [1954] 2 All E.R. 368 (C.A.); *Cardas v. Peerless Transportation Co.* (1941), 27 N.Y.S. 2d 198; *Phillips v. Delta Motor Lines* (1959), 108 So. 2d 409 at 414 (Miss.).

of care on those rendering assistance during emergencies,²⁰ they have effectively reduced the standard in favour of Good Samaritans, so that liability can only be imagined in cases of the most shocking and outrageous errors.²¹

That this unhappy anomaly of the common law, that you "may be damned if you do" but cannot be "if you don't", has somehow found its way into the consciousness of the North American physician is unfortunate, particularly at a time when there is increasing awareness and concern in the medical profession over malpractice suits. To the lay observer it is bewildering that men and women who in every act of their professional lives face the possibility that if they err grievously they may be subject to civil action, opt out in the emergency aid situation. There seems to be nothing special about such situations (except, perhaps, that statistically they may well be the most unlikely cases to succeed against a doctor) yet there is evidence that particular fear of malpractice is felt by physicians in Good Samaritan situations and that a considerable number accept the "out" offered by the common law and "pass by on the other side of the road".

The American Solution—Negative Legislation

Many North American jurisdictions faced with this problem have not been satisfied to leave it to the common law and the conscience of those on the road to Jericho, Peoria or Medicine Hat, and have sought to encourage physicians and others to be Good Samaritans by limiting or removing their potential liability for negligence.

In 1959, California passed the first American "Good Samaritan" statute, which read as follows:

No person licensed under this chapter, who in good faith renders emergency care at the scene of the emergency, shall be liable for any civil damages as a result of acts or omissions by such person in rendering the emergency care.²²

From this acorn, some 40 statutory oaks have grown. Although all are aimed at resolving the same problem, there are wide variations in how they have gone about the task. This difference in terminology and the paucity of litigation interpreting the statutes—which may well be indicative of the lack of effectiveness of the legislation—leaves a number of unanswered legal questions concerning these statutes.

Some of the Acts, as did the original California bill, absolve only medical practitioners; others apply to nurses,²³ dentists,²⁴ and various para-medical

²⁰*Texas Statute Absolves Tortfeasor from Liability for Negligence in Rendering Aid During Emergency* (1961-62), 75 Harv. L.R. 641 at 642.

²¹Busacca, *Pennsylvania's Good Samaritan Statute—An Answer to the Medical Profession's Dilemma* (1964), 10 Villanova L.R. 130 at 133.

²²Calif. Bus & Prof. Code, s. 2144. It is suggested, in (1933), 51 Calif. L. Rev. 816, that the California legislation sprang from an incident at Squaw Valley where a doctor who was present at the scene of a serious ski accident failed to help the victim who subsequently died for lack of the immediate treatment he could have given. His explanation was that he feared a malpractice action if he erred in the primitive conditions.

²³For example, Nebraska; also California since 1963; Alberta.

²⁴For Example, Mississippi.

personnel,²⁵ while some extend protection to everyone.²⁶ Some statutes protect all trained physicians,²⁷ while others protect only those physicians licensed within the state which enacted the law.²⁸ Statutes exempting only physicians or other limited groups may be subject to attack as "class" legislation in that they permit one group of individuals special considerations not accorded others. That there is an element of absurdity in this position becomes evident when one considers that a non-medical person who volunteers assistance may be held legally accountable for his actions while the only individual fully trained to render emergency care would be immune from the consequences of his negligent acts.

Another problem involves the ambiguity in most such statutes regarding the degree of misconduct that will be immune from civil action. Some states such as California, Delaware and Georgia appear to have created an absolute immunity for the Samaritan doctor, provided certain conditions have been met. Most have drawn back short of complete immunity and retained the possibility of liability in cases where there is "gross negligence"²⁹ or "wilful wrong"³⁰ or "wilful or wanton misconduct"³¹ or "acts or omissions intentionally designed to harm"³² or various combinations of these possibilities.³³ The Florida statute³⁴ appears to a myopic foreigner to be some sort of legislative sleight-of-hand. It states, in part, as follows:

Any person, including those licensed to practice medicine, who renders emergency care treatment . . . shall not be held liable for any civil damages as a result of any act . . . where the person acts as an *ordinary reasonable prudent man would have acted under the same or similar circumstances*. (emphasis added)

Since the emphasized portion is the ordinary legal test for negligence, it seems to be saying that there is no liability except when the actor is negligent. What the legislature giveth, the legislature taketh away.³⁵

When is negligence "gross" or "wilful" or "wanton" as compared with plain-wrapped, old fashioned or "venal"? This is a mystery that has kept generations of lawyers occupied when such terminology has appeared in other statutes.³⁶ What experience has taught is that such terms are an invitation to

²⁵For example, Maryland exempts ambulance and rescue squads.

²⁶For example, Texas and Wyoming.

²⁷For example, South Dakota, Alaska and Pennsylvania. Massachusetts is unique in extending the coverage of the Act to Canadian licensed physicians.

²⁸For example, California, Utah and Virginia.

²⁹See Arizona, California (for nurses but not doctors), Maryland, Alberta.

³⁰Alaska.

³¹Illinois.

³²Pennsylvania.

³³Michigan, Indiana, Kansas, Montana, Rhode Island.

³⁴Fla. Stat. Ann. s. 768.13 (1965) as set out in Chayet, *supra*, note 3 at 278.

³⁵One concedes that some protection does flow to doctors if the section is read as saying "any person, including doctors, will be judged by the standard of the layman". This, however, cuts across the usual formulation of the negligence test which ordinarily takes account of the superior skills of the doctor as part of the "circumstances". See Prosser, *Torts* (3d. ed. St. Paul: 1964) at 164. If the section is not a trick on doctors it certainly is on the layman who it also apparently means to encourage to stop. See also the Maine statute, Me. Rev. Stat. Ann., c. 66, s. 9-A (1963) which may also suffer from this difficulty.

³⁶See Prosser, *Torts* (3d ed., St. Paul: 1964) at 183-91.

litigation. To the extent that Good Samaritan legislation is intended to shield physicians from the vexation of being involved in law suits, those statutes which fail to grant absolute immunity are doomed to failure in effecting this purpose.

Many of the Good Samaritan statutes³⁷ require as a condition of immunity, whole or partial, that the physician—or other person—act in “good faith”. Few define the term. Are we dealing with a subjective standard whereby we are only to consider the state of mind and intentions of the physician, or is the standard of “good faith” an objective evaluation? One author³⁸ suggests that the individual must make three decisions which will later be examined in the light of an objective standard. He must conclude that an emergency situation in fact exists; that immediate emergency care is necessary, and that he is competent to provide the type of assistance which the victim’s condition demands. Pennsylvania has attempted a partial definition:

“Good faith” shall include, but is not limited to, a reasonable opinion that the immediacy of the situation is such that the rendering of care should not be postponed until the patient is hospitalized.³⁹

Without repeating the comments made above concerning the problems of ‘degrees of negligence’, it is probably fair to say that they are apposite to the notion of “good faith”.

The 1961 Texas Statute,⁴⁰ which contains a “good faith” clause, has an added ingredient that has been widely copied.⁴¹ To qualify for the exemption from civil liability the services must have been rendered without compensation. A physician is thus forced to act as a true Samaritan in that, should he desire the protection of the statute, he apparently cannot charge for services rendered in the emergency situation, although he is entitled to do so under established doctrine.⁴²

This aspect of the Texas legislation has a certain logic. If the doctor is to receive a special immunity perhaps he should not be able to claim remuneration in the same way as when he renders services that carry with them the risk of civil liability. This could be considered the price he pays for the privilege. As one commentator has pointed out:

the requirement that the care be gratuitous changes the whole emphasis of article ‘1(a)’ from the needs of the victim, to the injustice of holding a good Samaritan liable, while a Levite goes free.⁴³

On the other hand, one does not have to be a cynic to ask whether such a condition will not in practice inhibit the major objective of the legislation, i.e., to encourage the prospective Samaritan to stop. If a physician (or anybody else for that matter) expends considerable time and effort in ministering

³⁷For example, California, Texas, Virginia amongst others. Arkansas uses the term twice in its section. Ark. Stat. Ann. s. 72-624 (1963).

³⁸Busacca, *supra*, note 21 at 135.

³⁹Pa. Stat. Ann., s. 1642 (1963).

⁴⁰Tex. Rev. Civ. Stat. Ann., Article 12.

⁴¹For example, Massachusetts, West Virginia, Alberta.

⁴²*Cotnam v. Wisdom* (1907), 104 S.W. 164 (Ark.).

⁴³Howell, *supra*, note 11 at 915.

to an accident victim, why should he not be entitled to claim reasonable compensation? Or, put another way, time being the "stock-in-trade" of the professional, might not the doctor, in fact, be positively discouraged from stopping by this provision?⁴⁴

Most American statutes require that an emergency situation exist at the site of an accident in order for the provision to apply. Indeed, the Alaska statute requires that the "emergency circumstances" must "suggest that the giving of aid is the only alternative to death or serious bodily injury".⁴⁵ Does this mean that if a doctor stops to aid an individual injured in an automobile accident and discovers that the person is not seriously injured, then the physician is denied the protection of the statute? For what duration is the situation considered to be an "emergency"? Does the statute also apply to exempt the physician from liability in "emergency" situations in the hospital or in his office? If the injured person was at fault in the situation so that, strictly speaking, it was not an accident, does this mean that statutory immunity will be denied the physician? The statutes do not answer these queries.

Another legal difficulty besetting Good Samaritan legislation in the United States is that there is a possibility, at least, that many of these statutes may be unconstitutional. Many state constitutions provide that everyone shall have a legal remedy for harm done his person or property. It is clear that Good Samaritan legislation serves to deny one citizen's right to recover damages he might otherwise claim from another citizen. It might well be doubted whether the benefit to the public which constitutionally warrants the restriction of certain rights counterbalances the detrimental effects to the rights of the individual in these instances.⁴⁶

The careful wording of the relevant New York State legislation appears to prevent many of these ambiguities, although it retains the "gross" negligence difficulty:

Any duly licensed physician or surgeon who voluntarily and without the expectation of monetary compensation renders first aid or emergency treatment at the scene of an accident or other emergency, outside of a hospital, doctor's office or any other place having proper and necessary medical equipment, to a person who is unconscious, ill or injured, shall not be liable for damages for injuries alleged to have been sustained by such person or for damages for the death of such person alleged to have occurred by reason of an act or omission in the rendering of first aid or emergency treatment unless it is established that such injuries were or such death was caused by gross negligence on the part of such physician or surgeon.⁴⁷

Without doubt, the Good Samaritan statutes have created a host of intriguing legal problems. This is a delight to law professors and is not really a particular condemnation of the statutes or their draftsmen, since it is an almost inevitable result when legislatures take off in new directions. A Model Good Samaritan Act has been proposed which, if drafted with enough

⁴⁴Chayet, *supra*, note 3 at 31.

⁴⁵Alaska Stat., s. 80.64.365 (1962).

⁴⁶See, Note, (1963), 43 Boston U.L. Rev. 140; (1964), 10 Catholic 322; (1964-65), 48 Marq. L. Rev. 80 at 83.

⁴⁷N.Y. Educ. Law #6513(10) McKinney (1964).

perception and enacted generally, could resolve many of the ambiguities suggested above.⁴⁸

The important question, however, is not that of interpretation but whether or not the statutes are accomplishing their avowed purpose of encouraging people to stop to aid accident victims. On this issue, there is little evidence. One piece of negative evidence is that, in spite of the fact that these statutes are replete with interpretative difficulties, there seem to be no cases which have surfaced in the law reports raising these issues.⁴⁹ This may well suggest their utter irrelevancy. On the other hand, it is arguable that this demonstrates their complete efficacy in discouraging ingrate aid recipients from suing Samaritans. Balanced against this latter view, is, as previously pointed out, the almost complete absence of any such cases under the pristine, common law rules.

In any event, unravelling this mystery would not answer the crucial question: Do more doctors—do more people—act as Samaritans when shielded by a Good Samaritan Statute? Here, there are some faint clues. The earlier of the U.S. surveys mentioned previously,⁵⁰ found in 1961, that half the doctors polled would not stop in the Samaritan situation. The later (1963) of these surveys, by the American Medical Association, found the same split nationally amongst those polled although in the meantime there had been a considerable spread of Good Samaritan legislation. The possibly significant item in this survey is that ten per cent more doctors in states *without* Samaritan legislation would stop, than in states which had actually enacted Samaritan laws.⁵¹ Probably the Scottish verdict of “not proven” still applies to the question of the usefulness of these statutes; but there is at least some evidence that after a dozen years of trial of the “negative” approach, a North American change of direction to a “positive” one may now be appropriate.

The European Solution—Positive Legislation

Although historically sharing the position of the common law on the lack of any obligation to be a Good Samaritan,⁵² European countries, West and East, have arrived at a stance almost completely opposite to that of North American jurisdictions which have passed so-called Good Samaritan laws. European law, rather than maintaining our position, that one is free to pass on the other side of the road, or adopting our tactic of encouraging people to stop by offering them a legislative shield from civil liability for any additional injury they may inflict upon the person they are attempting to aid,

⁴⁸See the efforts of Miller and Zimmerman, “The Good Samaritan Act of 1966: A Proposal” in *The Good Samaritan and the Law* (N.Y.: 1966) 279. Their proposed statute deals with a much broader spectrum of Samaritan problems, for example, the problem of compensation to the Samaritan injured while assisting the police or attempting to prevent the commission of a crime. Our problem, of the liability of the Samaritan to the person he tries to help, is dealt with in secs. 10 and 12 of the statute.

⁴⁹Comment, (1965), 32 Tenn. L. Rev. 287 at 293.

⁵⁰*Supra*, note 3 of paper.

⁵¹Chayet, *supra*, note 3 at 36.

⁵²Amos and Walton’s, *Introduction to French Law* (3d ed. Lawson, Anton and Brown, 1967) at 218. See also, Tunc, “The Volunteer and the Good Samaritan”, in *The Good Samaritan and the Law* (N.Y.: 1966) 48.

has simply *required* all persons to aid those they find in distress. In other words, it is today, in most European countries, a *crime* to fail to be a Good Samaritan.

Starting in Portugal and the Netherlands over 100 years ago,⁵³ the movement toward penalizing those who act in the manner of the Priest and the Levite has spread to most of those countries which share the great legacy for good of Napoleon, the legal system derived from the Napoleonic Code. Those countries, in fact, constitute most of the rest of the world, excluding those of us who acquired our basic legal system through the accident of history of having been at one time or other part of the British Empire, but including, perhaps surprisingly, to a substantial extent, the Communist Bloc countries.

Since France has been the source both philosophically and legislatively of the considerable post-war momentum of this movement, let us examine in some detail the French legislation and experience. Article 63 of the French Penal Code (1941) as amended in 1945 and 1954 reads, in the part that is germane, as follows:

1. Any person who, by his immediate action and without danger to himself or others, could have prevented either a felonious act or a misdemeanour involving bodily harm, wilfully fails to do so, shall be punished by jailing for no less than three months nor more than five years and by fine from 360 to 15,000 francs, or other punishment . . .
2. Any person who wilfully fails to render or to obtain assistance to an endangered person when such was possible without danger to himself or others, shall be subject to like punishments . . .⁵⁴

The pedigree of this section is less than impeccable since in its original form—the first paragraph only—it was promulgated by the Vichy government under pressure from the German authorities in Occupied France.⁵⁵ With its emphasis on requiring people to act, when they could do so safely, to prevent the commission of crimes involving bodily harm, it had some marginal use in dealing with the Resistance.⁵⁶ However, that it was, in actuality, simply a logical progression from the moral notions of mutual responsibility and “engagement”⁵⁷ which were, by the 1940’s being widely incorporated into French law, is underlined by the fact that the French Assembly confirmed the legislation following the Liberation in 1945 and in 1954 broadened it to its present form which effectively requires people to act as Good Samaritans or risk penal consequences. The strength of French feeling on this issue is also

⁵³Portuguese Crim. Code, art. 2368 (dates from 1867); Dutch Penal Code, art. 450 (dates from 1881). Italy, Poland, Denmark, Rumania and Norway have Samaritan type provisions which pre-date World War II. See, *The Good Samaritan and the Law*, *supra*, note 52 at Dawson, at 70, Rudzinski, at 91-92.

⁵⁴*The French Penal Code*, Comparative Criminal Law Project (New York University: 1960).

⁵⁵Tunc, *Commentaire* (1946), Dalloz Legislation 37 at 38.

⁵⁶Somewhat comparable legislation, requiring citizens to assist peace officers when called upon to do so, is in force in many common law jurisdictions. For example, see 1972 Canadian Crim. Code, s. 118(b); Neb. R.S. s. 28-728 (1964).

⁵⁷For an outline of the historical and philosophical background, see Thorpe, *The Duty to Act: The French Experience and the New York Jurisdiction* (1965-66), 21-23 *Intramural L. Rev.* 87.

indicated by the fact that, of all the countries which, like France, impose penalties on those who fail to act as Good Samaritans, France's maximum (up to five years in prison) is the most severe.

It is sometimes suggested that "positive" legislation of this sort, while something of an adornment to the statute book, will have little effect, at least so far as applications of the statute through prosecutions is concerned. Although it may well be true that the major role of such legislation will be in reinforcing community attitudes in favour of assisting those in distress, the French experience suggests that atrophy is not the fate of such statutes. Article 63 has been applied regularly in the French courts.

Obviously, Article 63(2) is not an attempt to create a precise set of regulations to deal with the myriad situations where one might find one's fellow-man "endangered". The legislature has spoken in broad terms—in much the same way as legislatures have made it a crime to drive "negligently" or to publish "obscenity"—and have left it to the courts to cope with the details on a case-by-case basis.

Such words as "wilfully", "assistance" and "endangered person"—which are elements of this crime—require, and have received, interpretation. The justification permitted to one who has *prima facie* offended against Article 63—of failing to act because there was "danger to himself"—is similarly amorphous. What is danger? Is the test of it objective or subjective? Do we look at it through the eyes of the delinquent Samaritan at the time the events were taking place or through the eyes of the community after the event and in light of the knowledge then available as to the reality of the risk to the Samaritan involved?

It is beyond the scope of this paper (and the expertise of the authors) to pursue the resolution of these legal problems. What, hopefully, might be of interest is to mention a few of the situations where Article 63 has actually been applied both to doctors and to laymen. However, the real point to be made is that such "positive" legislation is alive and well and living in France—and elsewhere in Europe—and to consider whether this development has any relevance to the problem of emergency aid to accident victims in North America.

Early applications of Article 63⁵⁸ included the successful prosecution of a pharmacist for failure to notify a doctor of a serious error in a prescription he had filled, even though the patient was not in fact injured by the error and was beyond hope from natural causes when the error was discovered; of a wife who knew of her lover's intention to kill her husband during a trip, since she could have prevented the trip of her husband and lover without revealing the plot or her illicit relations; and of an individual for failure to hand a drowning man a pole which was lying on the bank. On the other hand, prosecutions of a defendant for failure to attempt to rescue when another's immediate action extinguished the fire on the endangered person's clothing, and of a doctor for failing to respond to a plea for medical help when he did not have personal knowledge of the danger and of the immediate necessity for aid, were unsuccessful.

⁵⁸The following French cases come mainly from Feldbrugge, *Good and Bad Samaritans* (1965-66), 14 Amer. J. of Comp. Law 630.

In one notorious case, a farmer had heard shooting during the night on his land, where some people were camping. He did not bother to investigate immediately and the next morning he found a girl covered with blood, who was still alive. He did not call a doctor or pay any attention to the girl, but later asked a passing motorcyclist to warn the police. When the police arrived, the girl was dead. The defendant's argument that the girl was beyond assistance in any event was not accepted by the court as sufficient justification for doing nothing.

A number of French cases have involved failures on the part of doctors or quasi-medical personnel to act to assist "endangered persons". In one, a physician refused to treat a sick child that had been brought to him when it had taken a turn for the worse. An appeal court reversed the doctor's acquittal at trial holding that where the danger was "imminent, certain and requiring immediate action"⁵⁹, the doctor should have acted. Thus, although a physician in France is free generally to select his patients, should he be summoned to attend an endangered person who is ill or wounded, his right to select is subordinated to his duty to render aid under Article 63.

In another actual case in France involving a physician, a woman nearly eight months pregnant became so ill that she had to be placed in an iron lung. The woman died from her illness, but her pregnancy was normal and the child was alive. The doctor could have performed a caesarian operation and thereby have delivered the child alive and normal, but the husband refused permission, saying that he did not want his wife's corpse disturbed. Assuming that the doctor must act quickly to save the child, what should he have done in this situation? In fact, he chose not to intervene to save the child's life. However, at least one expert⁶⁰ felt that, under the French Penal Code, the unborn child would be considered an "endangered person" such that the physician could have been successfully prosecuted, although the public prosecutor chose not to do so in this instance.

Physicians constitute one of the major categories of persons prosecuted under Article 63.⁶¹ It is interesting to note that, although doctors have objected to the courts determining such factors as the degree of risk involved and the imminence of the emergency contrary to their own opinions, the courts have consistently refused to give physicians the sole responsibility on the question.

It has been said that Article 63 lacks three characteristics normally found in modern penal laws; namely, the duty owed by one individual to another is not based on any pre-existing tie or relationship between the two; an intention to engage in positive conduct for a specific purpose is not required, nor is the offence defined with normal juridical precision.⁶² Be that

⁵⁹Though on the facts here the doctor was guilty, the effect of this decision was to narrow judicially the possible scope of prosecutions to those situations where there was very serious danger to the life of the "endangered person".

⁶⁰Larguier, *French Penal Law and the Duty to Aid Persons in Danger* (1963), 38 Tulane L. Rev. 81 at 87.

⁶¹Dawson, *Negotiorum Gestio: The Altruistic Intermeddler* (1961), 74 Harv. L. Rev. 1073 at 1106.

⁶²See, Thorpe, *supra*, note 57 at 90, which refers to Rolland, *Le Delit d'Omission* (1965), 20 Rev. de Sci. Crim. et Droit Comp. 583.

as it may, cases are being decided under it regularly and it is, presumably, playing a part in resolving the dilemma of aid for the accident victim.

The 'positive' approach is by no means peculiar to the 'Western' European countries. Most of the Eastern bloc nations have adopted comparable legislation. A passing glance at how the Soviet Union deals with this problem will hopefully be instructive. Article 127 of the Russian Criminal Code, enacted in 1960, states:

Art. 127(1) *Failure to Rescue*: Failure to render aid which is necessary and clearly not suffering of postponement to a person in danger of his life, if the offender knew that such aid could be given without serious danger to himself or other persons, or failure to inform the proper authorities or persons about the necessity to render aid, is punished with corrective labour not exceeding six months or with public censure, or entails the application of socially corrective measures.⁶³

Apart from the jargon which calls jail a "socially corrective measure", the Soviet Article is practically identical to the French Article 63(2). In addition, Article 157 of the Russian Criminal Code is pertinent. Mentioning physicians directly, the section requires that they give "medical aid in any situation where a failure to do so might have serious consequences".

Actually, the obligation to render aid to endangered persons may have the status of a constitutional duty in the Soviet Union and, thus, pre-date the Criminal Code provisions.⁶⁴ A leading Russian legal commentator, Agarkov, writing in 1938, suggested that failure of a swimmer to endeavour to save a drowning non-swimmer where he could do so in relative safety, would violate Article 130 of the 1936 Soviet Constitution.⁶⁵

Many other European countries,⁶⁶ both Western and Iron Curtain, have enacted similar "positive" legislation.⁶⁷ As with the foregoing "negative" statutes, many variations in form and application exist. For example, two jurisdictions, Belgium and Finland,⁶⁸ make the provision applicable not only to witnesses of the danger, but also to those to whom the situation is described

⁶³RSFSR art. 127. The 1960 provision is very much like that found in the pre-revolutionary Russian Penal Code of 1903 art. 491; see, *The Good Samaritan and the Law* (New York: 1966) at 128.

⁶⁴Hazard, "Soviet Socialism and the Duty to Rescue" in *xxth Century Comparative and Conflicts Law* 160 at 161 (Leyden, 1961).

⁶⁵Hazard, *supra*, note 64 at 167, refers to a 1940 decision of the Supreme Court of the U.S.S.R. where civil damages were awarded a citizen injured while volunteering to put out a fire. "His injuries resulted from the performance of a constitutional duty. It [is] a necessary consequence of the creation of the duty that a citizen injured in performing it recover damages for injuries suffered in performance."

⁶⁶Albania, Belgium, Bulgaria, Czechoslovakia, Denmark, Ethiopia, Finland, Germany, Greece, Hungary, Iceland, Italy, Netherlands, Norway, Poland, Rumania, Spain, Turkey, Ukraine, Yugoslavia.

⁶⁷The following section is based on materials set out in *The Failure to Rescue: A Comparative Study* (1952), 52 Col. L. Rev. 631 and Feldbrugge, *Good and Bad Samaritans* (1965-66), 14 Amer. J. of Comp. Law 630, from which several of the translations were obtained.

⁶⁸Article 422 of the Criminal Code of Belgium (1961): "When he has not observed personally the danger in which the victim finds himself, he cannot be punished if on the basis of the circumstances in which he was asked to help, he could believe that the request was not serious or that there was no danger to the victim." The Finnish Criminal Code provision applies specifically to doctors, the Belgian to any person.

by others in seeking their aid. Several countries offer the alternative of informing others in a position to help rather than personally rendering assistance.⁶⁹

In Albania,⁷⁰ once a causal connection is shown to exist between the omission of the accused and the death or injury of the victim, the accused may suffer "social censure". This might be akin to our publishing the circumstances and name of the so-called "bad Samaritan" in his local newspaper. In Czechoslovakia,⁷¹ the fact that the offender is a doctor, or an individual otherwise specially qualified to render assistance, is considered an aggravating circumstance to the offence of failure to rescue.

Certain countries⁷² focus on the danger, and only inflict liability where the peril is "grave". On the other hand, in Bulgaria,⁷³ a physician who passed by an injured person without rendering assistance was convicted under the statute in that he "left" the individual "knowing" that the "possibility" of danger to that person's life existed.

In countries such as Hungary⁷⁴ and Italy,⁷⁵ death of the accident victim is made a special aggravating circumstance of the offence of failure to stop, while, in others, such as the Netherlands,⁷⁶ death of the victim is made a prerequisite for punishment of the potential rescuer.

In some countries,⁷⁷ particular reference is made to the individual capabilities of the potential rescuer, for example, the Norwegian provision is that he perform "according to his ability". This would, presumably, diminish the obligation of those with less than normal qualifications—the ignorant or the handicapped rescuer⁷⁸—or increase the obligation of those with superior skills or endowment, such as doctors. Almost all the European statutes spell out that culpability cannot be found if the rescue attempt would have involved serious risk to the well-being of the potential rescuer, i.e., decency can be

⁶⁹See, the Finnish Criminal Code and Article 112 of the Criminal Code of the Ukraine.

⁷⁰Article 157 of the Albania Criminal Code (1952) permits the punishment of "social censure". Article 112 of the Criminal Code of the Ukraine employs the term "public censure".

⁷¹Article 207, Criminal Code of Czechoslovakia.

⁷²See, Article 547 of the Criminal Code of Ethiopia (1957) which states that "Whoever intentionally leaves without helping a person in imminent and grave peril of his life, person or health, when he could have lent him assistance, direct or indirect, without risk to himself or to third parties, is punishable with simple imprisonment not exceeding six months, or fine." This is basically the French position.

⁷³Under Article 148, Bulgarian Criminal Code, 1951.

⁷⁴Article 259, Criminal Code of Hungary (1961). In Hungary a prison sentence appears to be mandatory; in cases of death the maximum penalty is increased from one year to three years.

⁷⁵Article 593, Italian Criminal Code; in case of death, the maximum fine is doubled.

⁷⁶Article 450 of the Netherlands Criminal Code.

⁷⁷For example (i) Article 253 of the Criminal Code of Denmark (1930), uses the phrase "to the best of his power"; (ii) Article 387 of the Criminal Code of Norway uses the phrase "according to his ability" and (iii) Article 476 of the Criminal Code of Turkey (1926) requires that the potential rescuer give "that aid which he could give".

⁷⁸As, for example, the slightly stupid farmer in the famous case of *Vaughan v. Menlove* (1837), 132 Eng. R. 490 who was held for negligence even though living up to the standard of the reasonable man was beyond his capabilities.

expected, not heroics. In Rumania,⁷⁹ however, only real danger of death justifies inaction.

The West German Code, in addition to excusing inaction where there would be "considerable danger" to the rescuer, underlines the "social engineering" implicit in this type of law-making by specifically referring to "other important duties" the potential rescuer may have been engaged in, as an item to be put in the scale deciding whether "in the circumstances" Good Samaritanism was required.⁸⁰ Thus, a fireman on his way to a conflagration or a physician hurrying to a hospital to operate on one of his patients would not be expected to stop at an accident en route.

The European legislation has concerned itself entirely with the creation of criminal sanctions for failure to help endangered persons unlike the North American legislation which has exclusively looked to the problem of civil liability and its diminishment. This does not mean that the situation with respect to civil liability has remained the historical one of the common law and the continental law systems, i.e., no civil liability for failure to act. On the contrary, because, as a general principle in European countries, civil liability follows criminal liability, these countries have effectively reached a position opposite to ours with respect to the additional harm suffered by the man on the road through the failure of the passerby to assist him. The Priest and the Levite are civilly liable!

The reasoning process can be shown by reference again to the French legislation. Articles 1382 and 1383 of the Civil Code require those who occasion injury to another through "fault" to give redress. Article 63(2) of the Criminal Code makes it a crime to fail to render assistance to an "endangered person". A breach of the criminal law obviously is behaviour which can be characterized as 'fault', ergo, liability under the Civil Code sections for injuries occasioned through this type of fault.⁸¹

This, of course, does not obviate the need on the part of the plaintiff to prove damages and their causal connection to the defendant's fault which can, in this kind of case particularly, present difficult proof problems. Moreover, French law, as we have suggested is the case in North America both under the common law and the Good Samaritan statutes, is quite tender toward the rescuer and will seldom call his well meant efforts, which happen to go awry, to civil account unless they were monumentally mistaken.⁸²

⁷⁹Article 489 of the Criminal Code of Rumania.

⁸⁰Article 330(c) of the Criminal Code of Germany (1953) provides as follows: "Anybody who does not render aid in an accident or common danger or in an emergency situation, although aid is needed and under the circumstances can be expected of him, especially if he would not subject himself thereby to any considerable danger and if he would not thereby violate other important duties, shall be punished by imprisonment not to exceed one year or a fine."

⁸¹See Amos and Walton's, *Introduction to French Law*, *supra*, note 52. For an outline of some of the procedural difficulties, see Lawson, *Negligence in the Civil Law* at 27. Also see Rudzinski, *supra*, note 53 at 111-15.

⁸²Dawson, *supra*, note 53 at 71, and Tunc, *supra*, note 52 at 49. Tunc states that "even when failure to rescue does not constitute a crime, civil liability will be incurred whenever in the judgment of the court a reasonable man would have acted and . . . prevented the damage."

As one can observe, a multitude of variations are to be found in existing "positive" legislation similar to the state by state variation evident when "negative" legislation was considered. As suggested earlier in connection with the "negative" North American variety, the existence of variations or interpretive difficulties is not surprising or a matter of serious criticism. Obviously different jurisdictions will wish to emphasize, more or less, particular policies, or will gauge the effectiveness of some of the available options differently. Legislative drafting skills will vary from place to place. Criticism is valid if the legislation becomes some sort of statutory wart—a fate which appears to have befallen the North American "negative" Samaritan Acts. Criticism is demanded if legislation simply fails in its social aim, which, in the case of Samaritan statutes, is to persuade more people to aid the person in distress. There is some evidence that the European statutes are effective in this sense⁸³ but, unfortunately, nothing conclusive.

What is very clear is that the European "positive" statutes are not a dead letter. Surprisingly, they have been thought to be effective in furthering universal humanistic concerns by countries with political systems as different as France and West Germany on the one hand, and the Soviet Union and Ethiopia on the other. It may well be time that we in North America attempted the "positive" approach.

The European Solution for North America? Some Sociological, Legal and Moral Views

Is, however, our North American community actually too individualistic and amoral to permit the imposition of such a duty? Margaret Mead has said that our obsession with privacy has resulted in mass anonymity in our large urban centres and in a dulling of our senses which kills neighbourliness and caring about what happens to others.⁸⁴ The complexity of our contemporary society has effected a large amount of group despondency on the part of every individual. "For the most part, the individual must rely on others for his work, food, shelter, transportation, and he has increasingly come to place reliance on others for the occupation of his leisure time".⁸⁵ The reaction to this is a feeling that the individual can have no effect in his society, and a relapse into an apathetic concern for security and personal privacy, epitomized by the English phrase "I'm all right, Jack". Or, as James Thurber put it, "Stay where you are, you're sitting pretty".⁸⁶

Rosenthal, in his book *Thirty-Eight Witnesses*, which tells the horrible story of the Kitty Genovese murder where thirty-eight New-Yorkers failed to act as Samaritans, even to the minimal extent of phoning the police, discusses urban apathy: "This apathy was indeed a big-city variety. It is almost a matter of psychological survival, if one is surrounded and pressed by millions of people, to prevent them from constantly impinging on you, and the only way to do this is to ignore them as often as possible. Indifference to one's

⁸³ See Zeisel's Study, note 100, *infra*.

⁸⁴ Mead, "Our Right to Privacy", Redbook, April 1965, at 15.

⁸⁵ Thorpe, *supra*, note 57.

⁸⁶ Thurber, *Fables of Our Time* (1943) at 3, cited by Gregory, "The Good Samaritan and the Bad", in *The Good Samaritan and the Law*, *supra*, note 63 at 23.

neighbour and his troubles is a conditioned reflex of life in New York as it is in other big cities."⁸⁷

We swim in such a sea of books, learned articles, crisis journalism and television documentaries that tell us that we North Americans don't care, that sometimes one gets the impression that there are quite a few people out there who do care even if they are only the authors of these jeremiads. While it is true that we live in an urban society, we don't all live in New York City, which seems to be universally elected the place one is least likely to meet a Good Samaritan (probably by people who do not live there). One can appreciate that there are sociological and psychological difficulties in the way of a widespread burgeoning of the Good Samaritan ethic in North American life⁸⁸ without abandoning hope that the kind of Samaritanism we are basically concerned about—not heroics, but simply reasonable efforts to aid the ill, the injured, and the imperilled—could be fostered by a little legislative impetus. In any event, if this—to use the vocabulary of Alex, the anti-hero of *A Clockwork Orange*—"real horror show"—view of our society is, indeed, what might be described as the North American Way of Life, are we not justified in legislatively attempting to alter this life style in some small measure? The answer, of course, is yes.

The least of the problems standing in the way of North Americans attempting the European solution to the Good Samaritan problem is existing legal precedent on "nonfeasance", although there are some who seem to feel that this position came to us on a stone tablet or, at the very least, directly from the Founding Fathers. As we have seen, presently under the North American law, a physician is under no duty to come to the aid of one who is dying and might be saved (unless a prior physician-patient relationship existed), nor is an expert swimmer, with a boat and a rope at hand, who sees another drowning before his eyes, required to do anything about it. Some commentators suggest that the imposition of a duty to act in these situations is inappropriate to North American jurisdictions as the Anglo-American legal tradition assigns a less significant role to prevailing notions of morality.⁸⁹

This kind of argument is singularly unpersuasive. Because historically, understandably enough, the common law has focused on active misconduct, is no reason why in 1972 our law cannot move forward to face the somewhat more subtle problem of anti-social failures to act. The oft repeated phrase that "with purely moral obligations the (common) law does not deal"⁹⁰ rings with a false pride in our Anglo-Saxon jurisprudence. The accompanying chestnut that the remedy in such cases is left to "higher law" is, in the authors' experience, met annually by first year law students with a gigantic horse laugh. Perhaps they are cynics. More likely, being young, they can still recognize hypocrisy and specious reasoning when they see it.

⁸⁷Rosenthal, *Thirty-Eight Witnesses* (1964) at 92.

⁸⁸Two of the most perceptive and, in many ways, optimistic discussions of this problem are in *The Good Samaritan and the Law*, *supra*, note 63: Freedman, "No Response to the Cry for Help" at 171 and Gusfield, "Social Sources of Levites and Samaritans" at 183.

⁸⁹Thorpe, *supra*, note 85.

⁹⁰*Buch v. Amory Mfg. Co.*, (1897), 44 Atl. 809 (N.H.).

The views of Prosser, the leading American writer on Torts, are representative of most writers in this field on the subject of the common law's inability to cope with problems of failure to act. In commenting on the above type of examples, he has stated:

. . . such decisions are revolting to any moral sense. They have been denounced with vigour by legal writers. Thus far, the difficulties of setting any standards of unselfish service to fellow men, and of making any workable rule to cover possible situations where fifty people might fail to rescue one, has limited any tendency to depart from the rule to cases where some special relation between the parties has afforded a justification for the creation of a duty, without any question of setting up a rule of universal application.⁹¹

Prosser's view clearly is that "it's time for a change" in our law on failure to act. There are already a number of straws in the wind. International maritime conventions, which have been formally absorbed into our domestic law,⁹² require the person in charge of a vessel, so far as he can do so, without danger to himself or his vessel, to attempt to save *any* person he finds at sea in danger of being lost (not just persons with some antecedent connection to the vessel) or face criminal sanction.⁹³

The Highway Codes of almost all North American jurisdictions require that those involved in auto accidents not only remain at the scene and report the accident to the proper authorities, but that they render aid to those injured.⁹⁴ Administration of these statutes which turn failure to act affirmatively into crimes has proved of no particular difficulty—indeed the charge of 'failing to report' or 'remain at the scene' of a minor property damage collision is one of the most common on police court blotters. When it comes to the serious 'hit and run' type case, the police spare no effort in attempting apprehension and the courts suffer no apparent judicial difficulty in application of the law.

In a number of U.S. jurisdictions, these 'rendering aid' statutes have been construed as creating civil liability when the person not aided suffers additional injuries which could have been avoided if aid had been given, even though the defendant was not negligent with respect to the original accident.⁹⁵ Indeed, a California case has suggested that the duty to render aid in such a situation is a matter of common law.⁹⁶

"The process of extension" says Prosser, "has been slow and marked with extreme caution; but there is reason to think that it may continue until it approaches a general holding that the mere knowledge of serious peril . . . to another which an identified defendant might avoid with little inconvenience

⁹¹Prosser, *Torts* (3rd ed. 1964) at 336.

⁹²46 U.S. Code Ann. s. 728; R.S. Can. 1952, c. 29, s. 526.

⁹³As to civil liability, the modern cases hold liability for failure to make reasonable attempts to rescue: *Harris v. Penna R. Co.* (1931), 50 F. 2d 866 (4 CA); *Matthews v. MacLaren*, [1970] 2 O.R. 487 (C.A.). Cf. the older view found in *Vanvalkenburg v. Northern Navigation Co.* (1913), 30 O.L.R. 142 (App. Div.).

⁹⁴The Highway Traffic Act, R.S.O. 1970, c. 202, s. 140.

⁹⁵See, Prosser, *Torts* (3d ed. St. Paul: 1966) at 338: he mentions cases of this sort in West Virginia, South Carolina, Georgia and California.

⁹⁶*Brooks v. E. J. Willig Transp. Co.*, (1953), 225 Pac. 2d 802 (Cal.).

creates a sufficient relation recognized by every moral and social standard, to impose a duty of action."⁹⁷

So much for the supposed difficulties in law of "positive" Samaritan statutes. We believe they can be met as they already regularly are in Europe and, to a limited extent, in North America.

What remains as the nagging, unanswered but critical question is, do such statutes have any effect? It is all very well to say that successful prosecutions can and do occur under these "positive" statutes; do they increase the numbers of those who attempt to succour "endangered persons"? Unhappily, there are no studies that we know of that offer much help in answering this question. It seems fair to assume that law has some educative impact; that law can foster community attitudes as well as follow them.⁹⁸ Statistics are available from the jurisdictions which have "positive" Samaritan laws showing the number of convictions for failing to rescue. The numbers are usually small, for example, sixty-four convictions in France in 1962 for violations of Article 63(2). Does this mean most people render aid or does it mean that the vast numbers who may pass by are simply not caught or prosecuted? French commentators⁹⁹ seem to believe that 63 (2) has had a positive effect, that people do usually stop, presumably in greater proportions than would have done so in the absence of the statute. There is nothing very convincing available.

Samaritan Surveys

The most pertinent study we have discovered on the effectiveness of "positive" Samaritan legislation is that of Zeisel in 1965 in which he posed three questions around Samaritan situations to groups of university students in Germany (which has such a statute), Austria and the United States (neither of which has such a statute).¹⁰⁰ The one matter to which a clear answer emerged was that people do know whether or not aid to the endangered is a legal duty. Of the Germans, 86 per cent knew of the legal obligation, of the Americans 81 per cent knew they were not required to render assistance. To the other two questions, the Germans evinced the most Samaritan attitude. Three-fifths of the Germans would, if they could make the laws, punish Levite behaviour, whereas only a quarter of the Americans would, the remainder preferring to leave it to conscience. In all three countries, those interviewed felt that about 60 per cent of people faced with the situations would act as Samaritans, though the Germans were again on the high side and the U.S. participants on the low.¹⁰¹

Most of the other surveys in the area of Good Samaritanship have been directed at physicians trying to discover what their response would be to the

⁹⁷Prosser, *supra*, note 95.

⁹⁸Human Rights statutes can surely claim some success of this sort; prohibition and, perhaps, today, marijuana legislation are notable failures in their educative aspect.

⁹⁹Tunc, *supra*, note 52 at 56-62.

¹⁰⁰The Survey is reported briefly in Zeisel, "An International Experiment on the Effects of a Good Samaritan", in *The Good Samaritan and the Law*, *supra*, note 63, at 209.

¹⁰¹We would like to see the response to the question of how many of those polled actually would have intervened rather than their estimate of what percentage of their fellow citizens would have acted.

call for help, and why. Some of the U.S. surveys have been quite extensive,¹⁰² others have been very small samples done for the purpose of law review comments on proposed Good Samaritan legislation.¹⁰³ All have consistently indicated that between half and a third of those responding to the survey would *not* respond to the roadside accident victim's (this has been the usual situation posed) need for assistance, and that the reason for this is the doctor's fear of malpractice actions.

The most widely cited of these studies was one carried out by a medical publication called *The Medical Tribune* in 1961. We, unfortunately, have been unable to obtain a copy of this publication for first hand perusal and have had to rely on a summary of its findings printed in a national magazine.¹⁰⁴ Parenthetically, we might add that we suspect that this exposure in a national forum, of these figures, gave considerable momentum to the movement toward "negative" Good Samaritan legislation which had barely commenced at that time.¹⁰⁵ In any event, of the 1200 physicians surveyed, 50 per cent of those responding replied in the negative, fear of malpractice suits being given as the principal explanation.

These results accord with the result of the only other large U.S. survey of which we are aware. This was a survey of 7500 doctors made under the auspices of the American Medical Association.¹⁰⁶ There the national split was fifty-fifty on whether the doctor would stop. Intriguingly, while only 48 per cent in States which did *not* have Samaritan Acts would fail to stop, 52 per cent in States which had passed Samaritan statutes would not render aid.

A small survey of 130 Florida doctors conducted by the Florida Law Review¹⁰⁷ found that almost two-thirds would stop to render aid although Florida did not, at the time, have a Good Samaritan Act. The responses indicated that the Florida doctors had seriously erroneous views as to the standard of medical care the law expected of them if they rendered aid in such situations, and that they felt civil liability should not lie for simple negligence in such cases.

Geiser, in his 1961 Boston University study of Massachusetts' physicians,¹⁰⁸ posed an interestingly different, Samaritan type situation. He asked them how they would respond if they were in a theatre when the following announcement was made: "Is there a doctor in the house?" The results were as follows: (1) 27% would respond immediately:

¹⁰²That of the A.M.A. in which 7500 physicians were polled. See, *infra*, note 106; (1964), 189 J.A.M.A. 863.

¹⁰³That of S. Kahn for the Florida Law Review, in which 130 doctors only were polled. See, *infra*, note 107.

¹⁰⁴*Newsweek*, September 4, 1961 at 41.

¹⁰⁵A 'horror' story in *Reader's Digest*, 1963, at 83, entitled "Why Doctors are Bad Samaritans" by Kearney, may also have had considerable effect.

¹⁰⁶Reported in (1964), 189 J.A.M.A. 863. See also, Chayet, *supra*, note 3 at 36.

¹⁰⁷Reported in (1965), 17 Fla. L. Rev. 586 at 590.

¹⁰⁸Cited in Flowers & Kennedy, *Good Samaritan Legislation: An Analysis And a Proposal* (1965), 38 Temple L.Q. 418 at 419; and also see Fehlberg, *Physicians—Civil Liability for Treatment Rendered at the Scene of an Emergency* (1964), Wisconsin L. Rev. 494 at 497.

- (2) 41% would respond only if no other doctor responded;
- (3) 14% would respond 'only if I knew what was wrong';
- (4) 16% would not answer at all;
- (5) 2% no answer.

Of those in the middle three groups the following percentages cited fear of malpractice suits as the reason for their answer:

- (2) 35%;
- (3) 51%;
- (4) 76%

The situation does not, in our opinion, present as urgent an appearance of need for emergency aid as the roadside example. It is equivocal whether the circumstances are such that the doctor who responds will actually be called upon to exercise his professional skills. Yet the survey response is much the same. One-sixth of the physicians will not come forward at all in any circumstances and most of the others will respond only with great reluctance. The bogeyman of the Samaritan's possible malpractice action is again very much present in the minds of the doctors.

That the malpractice action arising out of Good Samaritanism on the part of doctors is indeed a myth has been proven by a 1968 study by the A.M.A.¹⁰⁹ Only 10 physicians out of 40,000 had ever had any kind of difficulty arise from acts of theirs in what might be described as Good Samaritan situations. Of these ten cases, only two had resulted in payments of any kind—both in settlements of under \$500 made because of their nuisance value—none had actually resulted in the commencement of an action, let alone a successful action on the part of the patient.

As to the actual effect of a malpractice action on a physician, there is some survey evidence that the fears have been grossly exaggerated. Wyckoff, in a study done in Connecticut,¹¹⁰ concludes as follows:

Objectively, the effects of a malpractice suit upon a physician appear to be much less than generally believed. Not one case was found of a physician compelled to give up his practice and more, no physicians lost their licences, none were rejected from hospital privileges, staffs, or societies; none were unable to obtain malpractice insurance though a handful had to switch companies and pay higher rates; none claimed to have suffered professionally and none suffered socially.

We would underline that he was *not* speaking of malpractice actions originating from an act of Good Samaritanism—these do not appear to exist—but of malpractice actions generally.

The final survey to be considered is the Canadian one, mentioned previously. In the summer of 1971, with the blessings and assistance of the Ontario Medical Association, we distributed a questionnaire to some 10,000

¹⁰⁹See Chayet, *supra*, note 3 at 25.

¹¹⁰Wyckoff, *The Effects of a Malpractice Suit Upon Physicians in Connecticut* (1961) 176 J.A.M.A. 1096.

physicians in the Province of Ontario—all the members of the O.M.A.¹¹¹ The questionnaire covered the medico-legal field generally, but eleven of the questions specifically concerned facets of the Good Samaritan issue. These questions, and their responses, were as follows:

Question #2

As you are driving along the highway you are forced to slow down due to a back-up of cars and notice that the road is partially blocked by an overturned car. Although a man is lying by the side of the car, injured, obviously no ambulance or medical help of any kind has yet arrived. In this situation, you would

Choices offered

- A. stop and offer medical assistance to the injured person;
- B. keep on driving.

Responses: Total 1855
Distribution (%) A) 91.9
 B) 8.1

Question #3

If a doctor or any other person who happens upon such a scene, fails to stop and offer assistance in such a situation, he can be held civilly liable to the injured person for any additional injury that person suffers which would not have been suffered if the assistance that might have been rendered by the passerby had been rendered.

- A. true;
- B. false

Responses: Total 1849
Distribution (%) A) 20.5
 B) 79.5
Correct Answer B

Question #4

Failure on the part of a doctor to stop and offer assistance at the emergency injury scene would be, in your opinion, most likely due to

- A. a feeling that he would not be of much help;
- B. a feeling that his time is valuable to him for his own purposes, therefore why spend it on total strangers;
- C. his fear of a lawsuit;
- D. his field of study being so specialized that he has forgotten much of the basic medical training or methods needed in such a situation;
- E. a feeling that he might have to travel a great distance from his office to give testimony.

Responses: Total 1817
Distribution (%) A) 22.9
 B) 2.7
 C) 49.4
 D) 16.1
 E) 8.9

¹¹¹There are some 11,000 qualified physicians in Ontario but approximately 1,000 are not members of the Ontario Medical Association. The evaluation of the responses to the Osgoode Hall Medical-Legal Questionnaire, prepared by the authors together with Daniel Paitich, Ph.D., and William Ballard, LL.B. is by no means complete. Some 2200 replies were received but to date only 1900 of these responses have been analyzed. The authors hope in the near future to be able to publish a complete analysis of the responses.

Question #5

In the situation described in Q.2, if a doctor who stops and renders medical assistance, makes a quite understandable error in his diagnosis due to the emergency circumstances prevailing, with the result that the course of treatment he pursues, although administered carefully, and correctly, causes additional injury to the accident victim, he (the doctor) is liable in a civil action to the injured party for the additional injuries.

- A. very likely;
- B. not likely.

Responses: Total 1855
Distribution (%) A) 35.3
 B) 64.7
Correct Answer B

Question #6

In the situation in Q.5 do you feel that the doctor ought to be held liable in a civil action to the injured party for the additional injuries?

- A. definitely yes;
- B. mildly yes;
- C. mildly no;
- D. definitely no.

Responses: Total 1855
Distribution (%) A) 1.6
 B) 7.2
 C) 13.6
 D) 77.6

Question #7

Given the fact situation in Q.5 except that the error in diagnosis leading to the additional injury was elementary in nature and quite inexcusable notwithstanding the emergency circumstances, is the doctor liable in a civil action to the injured party?

- A. very likely;
- B. not likely.

Responses: Total 1854
Distribution (%) A) 84.3
 B) 15.7
Correct Answer A

Question #8

Given the fact situation in Q.7 do you feel that the doctor ought to be liable in a civil action to the injured party for the additional injuries?

- A. definitely yes;
- B. mildly yes;
- C. mildly no;
- D. definitely no.

Responses: Total 1847
Distribution (%) A) 32.4
 B) 34.4
 C) 11.4
 D) 21.8

Question #9

In the past twenty years, there have been . . . cases of a doctor being held liable in Canada as a result of malpractice or negligence in a Good Samaritan (e.g., stopping at a roadside accident) emergency situation.

- A. 134;
- B. 0;
- C. 73;
- D. 21.

Responses: Total 1746
Distribution (%) A) 4.0
 B) 60.0
 C) 8.2
 D) 27.8
Correct Answer B

Question #10

Doctors in Canada are directed to lend assistance to an accident victim in accordance with:

- A. medical ethics;
- B. the Statutes of Ontario;
- C. Canadian Criminal Code;
- D. none of the above.

Responses: Total 1848
Distribution (%) A) 78.9
 B) 2.4
 C) 2.5
 D) 16.2
Correct Answer A

Question #11

Ontario should enact "Good Samaritan" legislation relieving physicians, registered nurses and other persons, of potential liability for damages for injuries to, or the death of a person, caused through an act or omission by a physician, nurse or other person in rendering medical services or first aid assistance, unless it is established that the injuries or death were caused by gross negligence;

- A. strongly agree;
- B. mildly agree;
- C. mildly disagree;
- D. strongly disagree.

Responses: Total 1854
Distribution (%) A) 79.7
 B) 12.8
 C) 3.8
 D) 3.7

Question #41

The law should require of all citizens an obligation to act to assist somebody whom he has discovered in a position of danger or suffering from incapacitating injury or illness, when he can give this assistance without risk of injury to himself or other persons.

- A. strongly agree;
- B. mildly agree;
- C. mildly disagree;
- D. strongly disagree.

Responses: Total 1850
Distribution (%) A) 52.6
 B) 27.3
 C) 10.5
 D) 9.6

A detailed analysis of the responses to these questions is not required for the purposes of this paper. We have set out the questions and responses fully, in the belief—quite possibly a mistaken one engendered by misplaced parental pride—that they have a certain intrinsic interest. A number of the responses, however, are pertinent to matters raised earlier and to the recommendations we shall be making subsequently. These we propose to consider in some detail.

The most astonishing response, at least in light of U.S. responses to the same question, is that to question (2) which indicates that 92 per cent of Ontario doctors would stop and offer medical assistance to an injured person. Obviously, if one has to fall by the wayside, Ontario is the place to do it. We conclude that either there is something wrong with the way we have asked our question or with the way the other surveys have asked theirs, or there is a much larger social and cultural gap between our countries or, at the least, between the medical professions of our two countries, than we would have supposed.

We have briefly suggested above¹¹² some hypotheses that might explain this discrepancy or attitude (assuming it really exists). We would add one piece of statistical information that might have some bearing on the differing attitudes. According to a survey made by the A.M.A. in 1963, 14 per cent of U.S. physicians in practice had been sued for malpractice.¹¹³ Probably that percentage has increased in the past nine years. On the other hand, our survey indicates that only three and one half per cent of Ontario physicians had, in 1971, ever been involved in a malpractice action.¹¹⁴

The responses to two questions, (3) and (10), tend to verify Zeisel's conclusion that by and large people are aware whether or not the law presently imposes a legal duty to render aid. Indeed, the proportion of those who knew it was only a moral duty, four-fifths, is virtually identical to Zeisel's findings amongst U.S. university students.

Of interest also was that while 91 per cent felt (question 6) that there should not be liability on the facts of question 5, which, in fact, in law there would not be, 84 per cent recognized there would be liability in the question 7 situation and, indeed, over two-thirds approved of imposing liability on the erring doctor in that case (question 8).

Most significant, however, are the responses to questions 11 and 41. It is something of a surprise to find that a group of which nine out of ten were prepared to act as Samaritans already and who, by and large, understood and approved of the legal resolutions of the problem of the Samaritan who caused further injury to the person he was aiding, overwhelmingly desire passage of a typical "negative", North American, Good Samaritan statute. Quite unexpected—illuminating perhaps—is the response to question 41 which presented Ontario physicians with a proposed statute modeled after many similar European enactments. It is exciting that so many members of a

¹¹² See text, *supra*, at note 5.

¹¹³ As reported in Fehlberg, *supra*, note 108.

¹¹⁴ Q. 221, Osgoode Hall Medical-Legal Project Questionnaire. Of 1857 respondents, 96.5 per cent had never been a party to a malpractice action, 3.2 per cent had been on one occasion, and 0.3 per cent had more than once.

profession (almost 80 per cent) which could be the first caught by such a provision, nevertheless have come out so strongly in favour of the imposition on them and others of a positive duty to aid those in danger or suffering from incapacitating injury or illness. Here then is a piece of unequivocal evidence that one group of North Americans are prepared to be—at least to a certain degree—their brother's keepers and would like to see all members of society obliged to undertake the elementary burdens of this sort in being a Samaritan.

Final Considerations and Recommendations

What conclusions can be reached from this rather long-winded examination of law, morals and statistics?

The first conclusion we have reached—which we freely admit does not flow inexorably from what has gone before—is that we should adopt into our criminal law, “positive” Samaritan legislation on the European model. In spite of the lack of any certain evidence that the European legislation has produced more Samaritan conduct in those countries than would have existed without the legislation; in spite of the fact that we recognize that life—big city life in particular—in North America has a tendency to foster indifference to one's neighbour and his plight (though we by no means accept the universality of this outlook as suggested by some writers), we feel that a trip down the European road would be, at worst, a worthwhile experiment and, more likely—and what we would expect—a permanent improvement in our legal system.

We are confident that “positive” legislation presents no insuperable juristic hurdles in enforcement or interpretation. There is relatively convincing evidence that people do know the broad legal rubrics of their own jurisdiction so that there is no reason to fear that consciousness of this positive obligation will somehow fail to be absorbed into the community knowledge. The law is a great teacher. That, as Zeisel's study shows, more Germans than Americans would act as Samaritans can, it is arguable, be attributed to the educational effect of the existence in Germany for twenty years of a “positive” Samaritan law.

The law should, to a considerable extent, mirror the real moral values of a society. We may not all be able to live up to the moral standards of the Good Samaritan but we are taught, and we feel, that it is he we *ought* to emulate, not the Priest or the Levite. A legal system which gives the advantage to those two shirkers over the Samaritan creates in the citizen a sense of injustice and invites disrepute.

Finally, there is clear evidence that an important segment of the public is not only willing to accept such “positive” law but desires to see such an obligation imposed.¹¹⁵ Whether American doctors would share the views of their Canadian colleagues is not certain. None of the U.S. medical surveys has, so far as we know, posed the question of “positive” legislation,¹¹⁶ but it would be in the humanitarian tradition of the American medical profession to share this view. As a cause for physicians to take up, it is infinitely more

¹¹⁵See *supra*, text under heading “Surveys”, Canadian survey, Q. 41.

¹¹⁶Zeisel's survey, *supra*, note 100, was directed at students.

attractive than that of the "negative" Samaritan statutes, though both types of legislation are ostensibly directed towards the same end, the increase of acts of aid to "endangered persons".

As a precise model for "positive" legislation the simple form of the French Article 63(2) is attractive, although the penalty provisions may be excessive.¹¹⁷ Whatever form was adopted there would certainly be legal problems of considerable difficulty. For example, if all must be Samaritans then inevitably some will suffer injury or loss in the course of their efforts to render aid. Are they to be compensated, and, if so, by whom? What about the expenditures of the Samaritan in aiding the victim—for example, blood on the upholstery of his car? Are distinctions to be made between the obligations of what might be called 'professional-type' Samaritans such as physicians and policemen and "amateur" types such as lawyers? These problems have all been faced by the Europeans and solved—more or less. We can and should expect nothing less of our legal system.¹¹⁸

As for the "negative" North American form of Good Samaritan law, there are reasonable grounds to argue for its disappearance from the statute books. First of all, the common law, rules so far as they impose the possibility of liability upon the well-meaning but incompetent Samaritan who increases the endangered person's injuries rather than minimizes them, are fair in their theory and have proved so in their practice. Secondly, of the 40 such pieces of legislation that now exist in their various exotic forms, it can fairly be said that they have had no discernible legal impact. Except for those that would create an absolute immunity from legal action for the errant Samaritan¹¹⁹—and it is at this point that most legislatures¹²⁰ and most 'fair-minded' observers,¹²¹ including physicians (if the Ontario survey is indicative) balk—we believe there can be little practical effect of the sort their sponsors hope for from these legislative exercises.

It is increasingly clear that the highwater mark in Good Samaritan legislating was reached in the first half of the 1960's. Only a handful have

¹¹⁷See Rudzinski, *supra*, note 53 at 123, for a suggested model suitable for North American usage.

¹¹⁸Dawson, *supra*, note 61, deals with some of these problems. Professor Wallace M. Rudolph's brilliant article, *The Duty to Act: A Proposed Rule* (1965), 44 Nebraska L. Rev. 499 touches just about all the bases on the problems which arise and the logical resolution of them.

¹¹⁹See discussion of "good faith" clauses, *supra*, at note 37.

¹²⁰Most of the statutes contain some sort of exception for cases of "gross negligence" or "wanton misconduct" or the like. See text, *supra*, at note 29. The exceptions may very well eat up the whole.

¹²¹See Yeutter, (1962), 41 Nebraska L. Rev. 609 at 616:

"Tort liability is based primarily on an analysis of social policy with its underlying risk-bearing and loss distributing factors. In most areas of the law, the movement has been toward extending liability. This, in contrast, is a no liability statute. Should not the courts consider who is better able to bear the risk and distribute the loss—the innocent injured party (who might be permanently disabled), or the negligent physician, surgeon, or nurse? Legislators and the courts should give due consideration to the precedent being established by these statutes. It has taken many years to dent the doctrine of charitable immunities. Are we now to embark upon an era of "Good Samaritan" immunities?"

been added in the last five years.¹²² Governor Kerner of Illinois stated the essential case against Good Samaritan legislation in eloquent form in his ultimately unsuccessful veto of the proposed Illinois Act in 1964:¹²³

This is a type of statute that has come to be known as a 'Good Samaritan law', and it has been adopted in one version or another in almost half of the states. This has resulted from literature widely circulated among doctors recounting the dire consequences in terms of malpractice litigation that can result from a physician's humanitarian act in rendering emergency roadside care to an injured party. So far as I can ascertain, the attendant danger to the physician is largely, if not wholly, imagined. A systematic inquiry into all of the reported malpractice decisions has failed to disclose a single such 'roadside instance'. Nor do I entertain any doubt but that the courts of the State, in such an action, would take into consideration all of the attendant circumstances and would not permit the unfair treatment of a physician who had responded to such an emergency.

A leading text in the tort field has noted that the courts have exhibited a tenderness to professional men that has 'few analogies in modern accident law' *To treat physicians with understanding, however, an approach with which I am in sympathy, is quite a different thing from shielding them entirely from liability, regardless of the carelessness exhibited or the damage occasioned thereby, which is what this Bill does. . . .*

. . . I do not believe that any class of citizens, be they physicians or otherwise, should enjoy a superior position, legally insulated from the consequences of their wrongful conduct.

The essential unfairness of this type of statute can be appreciated when it is considered that any private citizen untrained in first aid, who volunteers in an emergency may be held legally accountable for his actions, as may a nurse who is less trained than the physician. But the doctor, who is the only one fully trained to render emergency care, would be the very one rendered immune by this Bill from the consequences of his negligent acts. And, unlike the private citizen who responds, the action of the physician is not wholly voluntary, since fidelity to the precepts of his profession requires him in an emergency to render service to the best of his ability.

At the end, however, in spite of the logic and morality of the case against these "negative" statutes, we would not recommend that they be struck from the books and, indeed, would be prepared to countenance their spread to the other States and Provinces, so long as they contained the "gross negligence" proviso.¹²⁴

Because, although as Governor Kerner put it "the danger is imaginary", the fear is, evidently, quite real. Irrational it may be but it shows up in all the surveys as the major reason given for failure to stop. Although they do not see him in the shadow of patients who arrive at their office door, the doctors of North America are convinced, in spite of all arguments and statistics to the contrary, that Melvin Belli¹²⁵ is poised, ready to pounce, in the ditch just beyond the roadside accident victim they are thinking of aiding. If the physicians of Ontario who, according to our study, will stop to aid the accident victim and do generally perceive that the common law rules are not harsh on the Samaritan, want such a statute avidly—as they do—then the

¹²² Connecticut and Massachusetts in 1968; Alberta in 1969 are all we have discovered.

¹²³ Memorandum disapproving Ill. House Bill 1489 (August 26, 1964). The Illinois statute was eventually passed in 1965. See Ill. Rev. Stat., c. 91, s. 2A.

¹²⁴ In other words, if as we see it, they will not really cause any hardship to the deserving plaintiff.

¹²⁵ Mr. Belli is probably the most famous plaintiffs' lawyer in North America.

collective disquiet—probably not only amongst doctors but in the public at large as well—must be considerable. To lay the spectre to rest (though *quaere* whether it will), a legislative placebo of this sort is a cheap price.

Particularly if it proved helpful in making the passage of “positive” Samaritan laws acceptable in our North American community!

Actually, there is nothing patently inconsistent with both types of statute co-existing. The “positive” statute is concerned with getting people to commence to aid those endangered. The “negative” statute can then play its role in reducing the standard of care required of the altruistic actor in the emergency circumstances in which he is acting. This is basically the French position today. For purposes of any civil action which might arise through the errors of the Samaritan, the standard of care that he is held to is really that expected under the “gross negligence” type of North American Samaritan statute, or, in practical terms, that expected by the common law.

We would offer one final recommendation. If one assumes the passage of “positive” legislation in North America, followed by a considerable increase in the amount of Samaritanism toward accident victims, the question of the effectiveness of the aid rendered to the victims then becomes critical. Perhaps we can assume that when the medical Samaritan happens on the scene, the aid rendered will be usually competent and as effective as the circumstances permit. However, when the Samaritan is a layman, as obviously much more often will be the case, then the effectiveness of the emergency help given is much more likely to be doubtful, perhaps even harmful, considering the present state of popular knowledge of emergency first aid principles.

We would suggest that, following the introduction of a “positive” duty to aid,¹²⁶ consideration be given to the introduction of a crash programme in “first aid” education for the general public, similar to that given in wartime, or perhaps, more effectively, the introduction of a requirement that all licensed automobile drivers be required to pass a test in basic ‘first aid’ knowledge, as is the case with those who seek pilots’ licences in some countries. Perhaps it would be a realistic contribution to the problem of slaughter on the highways to combine with such a licensing requirement, a requirement that all new automobiles come equipped with a standardized first aid kit,¹²⁷ in the way that other types of safety factors are becoming mandatory. With a “positive” law requiring aid to be rendered, with basic first aid equipment in the first car to come along and a broad base of the population with a knowledge of such simple skills as how to apply a tourniquet, where to locate pressure points to control bleeding, and how to put an accident victim into the shock position, many needless deaths on the highway would be prevented, and many injuries that could otherwise be critical would be minimized.

¹²⁶One of the authors must confess that he has undergone a substantial change of views over the last six months on the question of the introduction of “positive” Samaritan legislation on the North American scene. See Sharpe, *Good Samaritan Legislation* (1972), Ontario Medical Review 220 at 287, for this previously held viewpoint.

¹²⁷A realistic, after-accident emphasis would appear warranted in view of the fact that Nader-inspired safety precautions have not as yet justified their existence (see *supra*, note 7). It is interesting to note that all new Mercedes Benz 350SLC automobiles contain a first-aid kit under a lift-up lid on the package tray as standard equipment. (See *Road and Track*, November, 1972, at 36).

